



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 58 of the Private Housing (Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/PR/23/3609**

**Re: Property at 58 The Causeway, Edinburgh, EH15 3PZ (“the Property”)**

**Parties:**

**Richard Wetton, Justine Marie Wetton, Garden Cottage, Monkkrigg, Haddington, EH41 4LB (“the Applicants”)**

**Richard McGregor, Kirsten Fenella Carolyn McGregor, C/O TC Young Solicitors, 7 West George Street, Glasgow, G2 1BA; 58 The Causeway, Edinburgh, EH15 3PZ (“the Respondents”)**

**Tribunal Members:**

**Joel Conn (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) refused the application.**

- 1) This was an application by the Applicants under rule 110 of the *First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended* (“the Rules”), for a wrongful termination order
- 2) The wrongful termination order sought an award of “up to the value of 6 months rent payments. £12,810” (*sic*). The application was dated 5 September 2023 and lodged on 1 October 2023. Supporting papers, in particular the lease and the Notice to Leave relied upon was lodged. Further to a request for information, additional documentation was provided by the Applicants to vouch the monthly rent as at the termination of the Tenancy (which had increased to £2,135 from February 2022). In advance of the case management discussion (“CMD”) the Respondents’ agent lodged written submissions and a lengthy inventory of productions.

## The Hearing

- 3) The matter called for a CMD of the First-tier Tribunal for Scotland Housing and Property Chamber, conducted by remote telephone conference call, on 12 April 2024 at 10:00. I was addressed by the Applicants. The Respondents were represented by Claire Mullen, solicitor, TC Young.
- 4) There was little in dispute as to the relevant time-line. I took both parties at length through the papers lodged in the application and by the Respondent. I noted the following points that were either agreed, or not disputed:
  - a) The Tenancy of the Property was under a Private Residential Tenancy (“PRT”) commencing on 19 February 2021. The initial rent was £1,995 per month.
  - b) The rent increased to £2,135 per month from February 2022.
  - c) On 5 April 2023 the Respondents’ estate agents (Savills) issued a Notice to Leave on the basis of Ground 4 (“Your Landlord intends to refurbish the Let Property”). The Notice said that no application to the Tribunal would take place before 1 July 2023.
  - d) Thereafter, the Applicants investigated alternative accommodation. As of 26 April 2023, they had not found suitable accommodation and emailed Savills to state that they “will let the legal process for evictions take its cause, as we are aware we have the right to appeal any decision made at a tribunal” (*sic*). The email did suggest that they would “listen to their proposal” if “the landlords of the property are willing to cover some of [the] costs” incurred in removing and moving to a new property.
  - e) On 27 April 2023, Savills sent a holding response by email saying that the Respondents were seeking legal advice.
  - f) On 3 May 2023 at 16:09, Savills emailed with a proposal from the Respondents as to financial terms which could be offered in return for an agreement on a voluntary vacation of the Property.
  - g) On 3 May 2023 at 17:50, the Applicants emailed Savills to say that “although we did identify a house that we would be happy to move to, we have not signed a tenancy agreement as yet, and can only do it with some help towards moving costs”. The email continued with a counter-proposal which, if accepted, the Applicants said they could agree to “vacate the property and return keys on 28<sup>th</sup> May”. The email concluded by stating: “If we cannot agree on these terms by Friday at the very latest then we will have no option other than to wait for the legal process to take its cause” (*sic*). (I note that 3 May 2023 was a Wednesday, so the Applicants’ deadline was thus 5 May 2023.)
  - h) On 4 May 2023 the Respondents’ agents issued a further Notice to Leave on the basis of Ground 1 (“Your Landlord intends to sell the Let Property”). The Notice said that no application to the Tribunal would take place before 30 July 2023. The Notice was served on the Applicants by Sheriff Officers at some point during the day but neither party made submissions on an approximate time for its service.
  - i) During the period 3 May to 5 May 2023, the Applicants identified a new property and swiftly sought to let it from its landlord. (The precise timeline was not specified, but it appeared to be the property that they referred to having identified in the email of 3 May 2023 at 17:50.)

- j) On 4 May 2023 at 13:34, Savills emailed the Applicants with a revised counter-proposal stating that it was “the landlords final offer and we will need confirmation that you accept this by 17:00 on Friday 5<sup>th</sup> May 2023” (*sic*). The email concluded by saying: “With regards to the notice that has been served, the landlords took legal advice as you indicated you wouldn’t be moving out of the property. You will be receiving a hand delivered notice from a Sheriff Officer...”.
- k) On 4 May 2023 at 14:24, the Applicants emailed Savills to respond to the revised counter-proposal and saying: “In principal we do agree to this but it will be subject to getting confirmation from the new letting agent that we are accepted on the property and that they can get us a tenancy agreement over in the next 24 hours”. The email went on to comment about various aspects of the revised counter-proposal and how it may be finalised and formalised.
- l) On 5 May 2023 at 12:36, Savills responded to the Applicants’ previous email by commenting in red. (It was not possible for me to discern which were the responses by Savills as I was provided only a black and white copy, but neither party made any submissions that relied on this.)
- m) On 5 May 2023 at 12:58, the Applicants emailed Savills to say: “This is agreed – Please let me know next steps”.
- n) On 5 May 2023 at 15:00, Savills emailed back to say: “The next steps would be you providing your notice to leave and then your signed contract for your new property...”
- o) On 5 May 2023 at 15:19, the Applicants emailed Savills saying: “Please accept this email as our Notice to leave 58 The Causeway, Edinburgh, EH15 3PZ on the 28<sup>th</sup> May 2023” and attaching the signed tenancy agreement for their new property.
- p) On 5 May 2023 at 16:48, Savills emailed the Applicants thanking them for the previous email and saying: “Our agreement is as advised in this email chain.”
- q) On 11 May 2023, the Respondents signed an agreement with Savills to market the Property. The email said that “we gain access on 1/6/23 we’ll assess if any redecoration is required prior to taking photos etc” (*sic*).
- r) The Applicants moved out of the Property by 28 May 2023 and the other terms of the settlement agreement between them and the Respondents were carried out.
- s) On 7 June 2023, the Respondents emailed their intended conveyancing solicitors, Coulters, saying that they were “[a]iming [for the Property] to be on the market by the end of the June” and seeking confirmation that they had until September 2023 to sell the Property so as to reclaim Additional Dwelling Supplement that they had incurred when buying their current home.
- t) The Respondents were advised around June 2023 that there were damp works needed at the Property and that it was best to undertake these before marketing. (On this, the Applicants had no knowledge to the specifics but confirmed that they had raised issues with damp with the Respondents when they were tenants. They said that works had not been undertaken during the Tenancy, and that they did not dispute that the Respondents may have received advice to have the works carried out before marketing. They

accepted that it was not unreasonable for the Respondents to carry out such damp works before marketing.)

- u) The damp works were completed on 18 August 2023. (The Applicants had no knowledge of this date but did not dispute it.)
- v) The Respondents did not thereafter place the Property on the market. At some point thereafter they moved into the Property, instructed renovation works at their current home, and currently remain in the Property. (The Applicants had no knowledge of the specifics but did not dispute that the Respondents were carrying out works at their current home, and that they had moved into the Property during these works.)

(Emails by the Applicants were sent by the first Applicant with the second Applicant cc'd in. Emails by the Respondents were sent by the first Respondent and the second Respondent was cc'd into some of them.)

- 5) The Applicants' position was there had been wrongful termination as the Respondents had always intended to seek possession of the Property so as to occupy the Property, as evidenced by the Notice to Leave of 5 April 2023. They believed that the subsequent Notice to Leave of 4 May 2023 was, in their view, merely an attempt to obtain vacant possession by an easier route, and that the lodged correspondence with Savills and Coulters – though accepted as genuine correspondence – was the Respondents simply going through the motions for appearances. The Applicants held that the true intention remained that the Respondents wished to occupy, which they have done so. The Applicants' position was that it was irrelevant whether the Respondents may now wish to leave the Property and place it on the market. (I was not addressed on whether this is indeed the Respondents' intention.) The Applicants' view was that the Respondents' future intentions are irrelevant as their reoccupation of the Property at this time shows the lack of true intention to place the Property on the market when they issued the 4 May 2023 Notice to Leave.
- 6) The Respondents' agent rejected any suggestion that the Respondents lacked an intention to market for sale when they had the Notice of 4 May 2023 issued. She submitted that it was possible to have dual intentions for a Property, but that there was an intention to sell when the 4 May 2023 Notice was issued, and through the period thereafter. She explained that her legal advice, of late April/early May 2023, was that the Respondents should issue a fresh Notice to Leave on Ground 1 due to the Applicants failing to agree to vacate voluntarily and their suggestions that an eviction application may be necessary. The Respondents' agent stated that she had advised the Respondents that, given the looming ADS reclaim deadline, it was not tenable for them to seek vacant possession to occupy while their refurbished their current home, potentially wait until after conclusion of a Tribunal process in order to obtain vacant possession, and only then arrange the refurbishment works, wait for the works to complete, move back out, and place the Property on the market and sell it all by September 2023. She said that she instead advised them that it was more sensible just to seek vacant possession to sell the Property and move straight on to that. She thus advised that a fresh Notice to Leave should be issued on Ground 1.
- 7) As for why the Property was not marketed for sale, the Respondents' submissions explained (and their agent expanded upon) a chronology that, after

the damp works were identified but could not be completed until August 2023, it was no longer practical to sell by the ADS reclaim deadline. The Respondents' financial position had also improved during June 2023, so by August 2023, it was possible for them to retain both properties while the refurbishment was carried out to their current home, with them moving into the Property in the meantime. The Respondents' position was that this was a genuine change of circumstances and did not show that there was any misleading statement in the 4 May 2023 notice.

- 8) Further there was reference in the Respondents' submissions to an off-market viewing by a prospective purchaser on 12 June 2023. This did not result in an offer and, though the Respondents' agent said she was able to provide further evidence of the viewing being arranged, the Applicants stated that they did not think evidence of a single off-market viewing was sufficient to overturn their position that there was no true intention to market for sale by the Respondents.
- 9) The Respondents' principal defence was however that neither sections 57 or 58 of the 2016 Act applied because the Tenancy was terminated not due to either Notice to Leave or an order for eviction, but further to the Applicants' voluntary notice under section 48 (contained in their email of 5 May 2023 at 15:19). She said that because that notice was for less than 28 days, she advised that it needed to be positively accepted as part of the settlement agreement and that this was done by Savills (their email of 5 May 2023 at 16:48). The Respondents held that it was this exchange of emails which terminated the Tenancy and not either of the Notices. The Respondents' agent said that correspondence from 26 April 2023 showed that the Tenancy came to an end after the negotiation of settlement terms under which the Applicants would agree to vacate voluntarily and not further to a Notice to Leave.
- 10) The Applicants' response to this defence was that they only sought a new property, and negotiated terms to leave, because of the 5 April 2023 Notice to Leave. They explained at length in their application and at the CMD that it had been most inconvenient to them to relocate while trying to minimise disruption to schooling for their daughter. They would not have done so had they not felt under pressure by the threat of eviction by the 5 April 2023 Notice to Leave, though they conceded that at the time they were aware that they could not be evicted without an order from this Tribunal.
- 11) This led to a discussion as to the precise chronology of events between 3 and 5 May 2023, that is before the second Notice to Leave through to shortly after when the Applicants entered into a new tenancy for a different property and issued their notice that they would leave on 28 May 2023. The Applicants accepted that the Tenancy ended on their proposed date of 28 May 2023 and not on either of the dates under the Notices to Leave (expiring on 30 June and 29 July 2023). The Applicants further conceded that they were looking for a new home prior to the second Notice to Leave, due to their concerns about the first Notice to Leave. Significantly they conceded that they entered into their new tenancy, issued their email with their notice on 5 May 2023, and agreed terms with the Respondents to leave the Property for reasons unconnected with the service of the second

Notice to Leave which only arrived some time during 4 May 2023. By that time they had already identified the new property and were taking steps to secure a tenancy of it, and were already in the middle of negotiating terms with Savills over a voluntarily vacation date of 28 May 2023. (This date is first mentioned in the Applicants' email of 3 May 2023 at 17:50.)

#### *Further procedure*

- 12) I sought the parties' submissions on further procedure. The Applicants wished a hearing, principally as they wished the Tribunal to assess evidence from the Respondents as to the truthfulness of their intention to market for sale. They would also then provide their submissions on the relevance (or otherwise) of any evidence from the Respondents on the off-market viewing of June 2023, and the relevance of any current intention the Respondents may have to vacate the Property and place it on the market for sale.
- 13) The Respondents sought refusal of the application at the CMD, on the grounds that the Tenancy had terminated under section 48 and therefore no order of wrongful termination under sections 57 or 58 was possible. Further, they sought expenses.

#### **Findings in Fact**

- 14) On or about 5 January 2021 the Respondents let the Property as a Private Residential Tenancy to the Applicants under a lease with a commencement date of 19 February 2021 ("the Tenancy").
- 15) On or about 5 April 2023, the Respondents' agent drafted a Notice to Leave in correct form addressed to the Applicants, providing the Applicants with notice, amongst other matters, that the Respondents sought to terminate the Tenancy on the ground that "Your Landlord intends to live in the Let Property".
- 16) By in or around late April 2023, the Applicants – further to their concerns as to the Notice to Leave and a desire to secure alternative accommodation - sought new housing. They had not obtained a new home by 26 April 2023.
- 17) On or about 26 April 2023, the Applicants proposed to the Respondents' agent terms under which they may be able to agree to leave the Property voluntarily.
- 18) By on or about 3 May 2023, the Applicants identified a potentially suitable new property.
- 19) On or about 3 May 2023, the Applicants proposed to the Respondents' agent more specific terms under which they would agree to leave the Property voluntarily by 28 May 2023, in return for agreed payments and rent reductions, and other terms, being agreed with the Respondents.
- 20) On or about 4 to 5 May 2023, the Applicants concluded the application process to let the new property and signed the Tenancy Agreement.

- 21) On or about 5 May 2023 at 12:36, the Respondents' agent provided the Applicants by email the full details of the Respondents' proposal on an agreed termination of the Tenancy by 28 May 2023. The first Applicant responded by email to the Respondents' agent at 12:58 to accept the terms.
- 22) On or about 5 May 2023 at 15:19, the first Applicant emailed the Respondents' agent with notice to leave the Property by 28 May 2023 and attaching a copy of the tenancy agreement for their new property.
- 23) On or about 5 May 2023 at 16:48 the Respondents' agent emailed the Applicants to accept the terms for the voluntary vacating including the proposed date.
- 24) On or about 4 May 2023, the Respondents' agent drafted a Notice to Leave in correct form addressed to the Applicants, providing the Applicants with notice, amongst other matters, that the Respondents sought to terminate the Tenancy on the ground that "Your Landlord intends to sell the Let Property". This was served on the Applicants at the Property some time during 4 May 2023 by Sheriff Officer.
- 25) The Applicants moved out of the Property voluntarily by 28 May 2023.
- 26) The Respondents took steps to instruct the marketing of the Property in or around May and June 2023, but did not proceed to do so.

### **Reasons for Decision**

- 27) I was obliged to the Applicants and the Respondent's agent for the detailed submissions. I was satisfied that sufficient evidence was provided by both parties to allow me to analyse the issues in full without a further hearing.
- 28) In regard to wrongful termination, the relevant provision is at section 58 of the 2016 Act:
  - (1) *This section applies where a private residential tenancy has been brought to an end in accordance with section 50.*
  - (2) *An application for a wrongful-termination order may be made to the First-tier Tribunal by a person who was immediately before the tenancy ended either the tenant or a joint tenant under the tenancy ("the former tenant").*
  - (3) *The Tribunal may make a wrongful-termination order if it finds that the former tenant was misled into ceasing to occupy the let property by the person who was the landlord under the tenancy immediately before it was brought to an end. ...*
- 29) I am satisfied that there was nothing that the Respondents did (nor was done on her behalf) that misled the Applicants into ceasing to occupy the Property. The Respondents conceded, after some lengthy discussion, that they identified their new property, entered into a lease of it, agreed terms with the Respondents on rent reduction and other terms, and issued their own notice to leave the property

(as at 28 May 2023) further to the pressure they felt as a result of the Notice to Leave of 5 April 2023. That Notice relied on Ground 4: that the Respondents sought to reoccupy. The Respondents have reoccupied, so the Applicants cannot have been misled by the terms of the April notice. Further, there can be no claim under section 58, especially one based on the terms of the Notice to Leave of 4 May 2023 (on Ground 1: that the Property was to be sold) as the Applicants accept that their decisions were not based on the terms of that Notice. It arrived after discussions on voluntarily vacating were well-advanced and the Applicants were already negotiating to enter into a new tenancy. Even if the Respondents had no true intention to market (which the Respondents deny), the Notice to Leave of 4 May 2023 did not mislead the Applicants “into ceasing to occupy the let property”.

- 30) This is all without analysing whether it is correct that the termination of the Tenancy of the Property was under section 48. There could be circumstances where, while a section 50 Notice to Leave expires (or indeed after it expires if the section 50 Notice to Leave is being disputed), a landlord and tenant agree for the tenant to leave further to the tenant providing their own “notice to leave”. I do not offer a concluded view as to whether such a notice to leave ceases to be a section 48 notice to a tenant if the tenant only issues it due to its concerns as to the landlord’s section 50 notice. The Applicants submit that they did provide their notice to leave only because of the landlord’s section 50 Notice to Leave but as that due to the April Notice to Leave (which was on Ground 4) I do not require to consider the issue further.
- 31) There is further no benefit to the Tribunal hearing the evidence of either of the Respondents (or from their advisers and contractors) as to the circumstances as to why the Respondents instructed Savills and Coulters to advance a sale, then did not place the Property on the market, and instead chose to occupy the Property. I do not require to consider the Respondents’ true intentions in regard to the Notice to Leave of 4 May 2023. The Respondents’ true intentions in regard to the Notice of Leave of 5 April 2023 are not at issue (as it is not the Applicants’ claim and further they submit that the Notice of Leave of 5 April 2023 shows the Respondents’ true intentions).
- 32) Insofar as a motion for expenses may or may not be lodged, and as the Rules allow at rule 17(4) for a decision to be made at CMD as at a hearing before a full panel of the Tribunal, I am refusing the decision at this time. The Applicants’ right of appeal dates from the intimation of this decision and is not dependent on any subsequent decision on expenses.
- 33) In regard to the Respondents’ motion for expenses, though it was mentioned in their written submissions and some oral submissions were made at the CMD, these are both in advance of my decision to refuse the application. It is appropriate to consider any motion now that the application is concluded. I wish any motion to be in writing and clearly state the sections of the application process for which expenses are sought and the grounds for the motion. I shall issue a Notice of Direction setting a timetable for lodging of any motion with supporting submissions (of four weeks, and for four weeks for the Applicants to reply). A continued CMD should be set to deal with expenses only, and it will only



be held if a motion is lodged. Further, I reserve my right to consider the motion without a hearing under Rule 18. Parties should provide written submissions on the appropriateness of a determination on expenses without a hearing.

### **Decision**

34) In all the circumstances, I refuse the order for wrongful termination.

### **Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.**

**Joel Conn**

12 April 2024

Legal Member/Chair

Date